

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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IN RE PHARMACEUTICAL INDUSTRY	)	
AVERAGE WHOLESALE PRICE	)	MDL NO. 1456
LITIGATION	)	Civil Action No. 01-12257-PBS
_____	)	
THIS DOCUMENT RELATES TO	)	Judge Patti B. Saris
Master File No. 01-CV-12257-PBS	)	
_____	)	

**JOINT MOTION OF PLAINTIFFS AND THE TRACK 1 DEFENDANTS FOR  
ENTRY OF CASE MANAGEMENT ORDER NO. 12 RELATING TO TUTORIAL  
PROCEDURES**

Plaintiffs and the Track 1 Defendants hereby move jointly for the entry of Case Management Order No. 12, which sets forth agreed upon procedures for the “Tutorial” previously ordered by the Court:

1. By order dated September 21, 2004, the Court granted the defendants’ motion, made in connection with plaintiffs’ motion for class certification, for a “tutorial” to inform the court about the pharmaceutical industry and the manner in which participants in the industry operate. (Docket No. 1051).

2. In the same order, the Court also indicated its intent to appoint its own independent expert to aid the court in connection with plaintiffs’ motion for certification.

3. Counsel for plaintiffs and the Track 1 Defendants have conferred about the desirability of establishing procedures for the tutorial and for determining a recommendation to the Court of a person to serve as an independent expert. These agreed-upon procedures are set forth in proposed Case Management Order No. 12, attached hereto.

4. The argument on plaintiffs' class certification motion is currently scheduled for December 17, 2004. CMO No. 12 would provide for the identification by each side of its "tutorial" expert by November 15, 2004 and for the submission of any written or electronic tutorial materials to the Court by December 3, 2004. It also suggests that the Court schedule the tutorial hearing, subject to the Court's convenience, sometime during the week of December 13, 2004, prior to the class certification argument. (See CMO No. 12, para. IV. A).

5. Proposed CMO No. 12 also provides procedures for selection of a court-appointed independent expert. (Paras. III. A-D). In brief, the parties have suggested that we use the services of Eric Green, Esq. (the mediator previously appointed at the suggestion of the parties) to aid counsel in an effort to identify a candidate to be recommended to the Court to fill this important role. The order provides for such a recommendation to be made to the Court no later than November 12, 2004. Mr. Green has agreed to serve in this role at our request and at the parties' expense.

6. The parties' proposed CMO No. 12 is attached hereto. Plaintiffs and the Track 1 Defendants believe that it will provide important procedures for the benefit of the parties and the Court in the tutorial process. We respectfully request that the Court grant our joint motion and enter CMO No. 12 as proposed, scheduling the tutorial sometime during the week of December 13, 2004 if possible.

Respectfully submitted,

By: /s/ Thomas M. Sobol  
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DATED: October 18, 2004

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**CERTIFICATE OF SERVICE**

I certify that on October 18, 2004, a true and correct copy of the foregoing Joint Motion for Entry of Case Management Order No. 12 was served on all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to Verilaw Technologies for posting and notification to all parties.

/s/ Lucy Fowler

Lucy Fowler

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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AVERAGE WHOLESALE PRICE	)	MDL No. 1456
LITIGATION	)	
	)	CIVIL ACTION: 01-CV-12257 PBS
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Master File No. 01-CV-12257-PBS	)	Judge Patti B. Saris
	)	
	)	

**[PROPOSED] CASE MANAGEMENT ORDER NO. 12  
TUTORIAL PROCEDURES IN CONNECTION  
WITH CLASS CERTIFICATION MOTION**

On September 21, 2004, the Court granted the Fast Track Defendants' Motion for Leave to Present a Tutorial to the Court Regarding Pharmaceutical Pricing and Reimbursement. The Court enters the following order to establish the procedures that will govern the process.

**I. FORMAT**

A. Plaintiffs and the Fast Track defendants (as a group) may each file one electronic or other expert submission presenting a general overview of the pricing, reimbursement and distribution of pharmaceutical products in the United States. These "tutorials" shall consist principally of a description of the industry and the way in which participants in the industry operate. The experts shall not express opinions on the ultimate issues as to whether plaintiffs' proposed classes can or should be certified or whether plaintiffs' claims do or do not have merit.

B. Each of the plaintiffs and defendants (as a group) shall designate one presenting Tutorial Expert who will appear at the Tutorial Hearing. The designations shall be exchanged by counsel for the parties by November 15, 2004.

## **II. SUBMISSION OF TUTORIAL AND DISCOVERY OF TUTORIAL EXPERTS**

A. On December 3, 2004, plaintiffs and the Fast Track defendants shall each file a copy of their respective tutorials with the Clerk's office, provide a courtesy copy to the Court, and serve a copy on the opposing parties. A copy of the curriculum vitae for the Tutorial Expert shall accompany the tutorial.

B. There shall be no depositions of the Tutorial Experts. However, on or before December 6, 2004, plaintiffs and the Fast Track defendants shall exchange copies of the materials relied upon by their respective experts, to the extent such materials are not publicly available or part of the discovery record. In the alternative, the parties may agree to exchange indices of the materials relied upon by the experts in order to allow the opposing party to select which materials should be produced by December 6, 2004.

## **III. SELECTION OF INDEPENDENT COURT APPOINTED EXPERT FOR TUTORIAL PROCESS**

A. On or before October 29, 2004, plaintiffs and the Fast Track defendants shall exchange lists of up to five potential independent experts for consideration of appointment by the Court, to aid the Court solely in the tutorial process.

B. If the parties cannot agree on an expert to recommend for court appointment from among those individuals suggested by each side, then counsel for the parties shall submit their respective lists and shall together confer with Eric Green, Esq. This conference may be conducted by telephone and should occur no later than November 5, 2004. Mr. Green may also communicate directly with the potential experts. After hearing the comments of counsel and communicating to the experts to the extent he sees fit, Mr. Green shall recommend to the Court one candidate for appointment as an independent expert by the Court. The recommendation shall be submitted by November 12, 2004. The parties may by November 16, 2004 file any objections or other comments with respect to Mr. Green's recommendation.

C. If the independent expert is appointed by the Court, the parties shall provide the expert with a copy of the operative complaint, a copy of all filings relating to class certification and a copy of the tutorials as soon as they are available. The expert may also request further materials if desired.

D. The fees and expenses of the court appointed expert, as well as Eric Green for his services in connection with this selection process, shall be borne by the parties in the same proportion as previously agreed to in connection with the mediations conducted by Mr. Green.

#### **IV. TUTORIAL HEARING**

A. A hearing on the tutorials will be held on December \_\_, 2004 at \_\_\_\_\_.

B. At the hearing, each Tutorial Expert will have 30 minutes to provide a summary of the tutorial, either through direct questioning or in narrative format or both. Counsel for the opposing party shall have 30 minutes to cross-examine. Counsel for the sponsoring party shall have 15 minutes to re-direct. The Court will also have the opportunity to question the witnesses.

C. The court appointed expert will attend and will be available for questioning by the Court.

IT IS SO ORDERED this \_\_\_\_ day of October, 2004.

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United States District Judge